

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 13, 2007**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2006AP1158**

**STATE OF WISCONSIN**

Cir. Ct. Nos. 1995CF74, 1995CF78

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAY A. STARKWEATHER,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Dunn County:  
BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jay Starkweather appeals an order denying his WIS. STAT. § 974.06<sup>1</sup> motion without a hearing. The motion alleged Starkweather's decision not to testify at the first phase of his bifurcated trial was not a knowing and voluntary choice because it was based on inaccurate information provided by his trial attorney, Earl Gray. The motion also alleged Gray was ineffective when he determined that Starkweather's testimony better fit in the second phase of the trial. The motion also alleged Gray was ineffective for failing to use evidence that an investigator allegedly told Jean Starkweather, Jay's mother, that the victim, Ted Demery, had been dead for some time when the police found him.<sup>2</sup> Because we conclude that Starkweather's arguments are procedurally barred and introduction of the investigator's statement would have been inconsistent with the defense, we affirm the order.

¶2 Starkweather was convicted in 1996 of first-degree intentional homicide while armed, four counts of attempted first-degree intentional homicide and one count of first-degree reckless endangering safety. The charges arise from a shooting spree in 1995. Starkweather, apparently believing that some individuals conspired to take his father's land, shot and wounded Wayne Kittleson and Martin Austreng. He then went to his father's house and took his father's handgun and ammunition for a .9 millimeter and a .380 magnum gun and left with a gun in each hand. At approximately 8:44 a.m., Rebecca Wheelock, Starkweather's tenant, heard a single gunshot coming from the area of Demery's

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

<sup>2</sup> Starkweather raised other issues in the postconviction motion that are not pursued on appeal.

trailer. A deputy who initially arrived on the scene in response to a report of gunfire also heard a single shot at approximately the same time. Starkweather subsequently fired at police who shot and wounded him. Police later found Starkweather with a .9 millimeter handgun near his left hand and a .380 magnum handgun between his feet. They found Demery's body lying in the doorway to his trailer, shot in the face. Examination of the bullet and shell casing established that Demery had been shot by the gun found at Starkweather's feet.

¶3 Starkweather pled not guilty and not guilty by reason of mental disease or defect. At the first phase of the bifurcated trial, Attorney Gray informed the court that Starkweather had decided not to testify during that phase.

My client has a desire to tell his story; however, it's my opinion, based on my knowledge of the case and experience, that what he has to say would be better fit in the second phase of this trial, if there is a second phase. I advised him as you advised him yesterday that he has a right not to testify. And it's my advice to him not to testify. He told me this morning, and I believe he's going to tell the court now, that he has decided not to testify in this phase of the case, knowing full well that he has an absolute right to testify and that not his lawyer or anybody else in the world could stop him from testifying.

Starkweather did testify at the responsibility phase, denying that he shot Demery, stating that he found the .380 firearm at Demery's house following Demery's death and picked it up, claiming self-defense in his shooting of Kittleson and Austreng and stating he could not recall shooting at the police. The jury found that he suffered from a mental illness but that illness did not cause him to lack capacity to appreciate the wrongfulness of his acts or conform his conduct to the requirements of law.

¶4 Represented by counsel, Starkweather filed a postconviction motion and an appeal, arguing his waiver of the right to testify was involuntary and his

trial counsel was ineffective for forcing him not to testify at the first phase. We rejected that argument and a petition for review was denied. Starkweather then filed a 180-page pro se postconviction motion under WIS. STAT. § 974.06 in which he did not raise any issue regarding the waiver of his right to testify, but did refer to Jean Starkweather's statement that an investigator told her Demery had been dead hours before the morning shooting incident. The trial court denied that postconviction motion and Starkweather appealed. His family retained his present counsel at that time and his counsel voluntarily dismissed that appeal and filed the postconviction motion that is the subject of this appeal.

¶5 The trial court may deny a postconviction motion without a hearing if the motion presents only conclusory allegations or if the record otherwise conclusively demonstrates that the defendant is not entitled to relief. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. An issue that was decided in earlier postconviction proceedings cannot be raised in a subsequent postconviction motion no matter how artfully it is rephrased. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). If an issue was not raised in previous postconviction motions, a defendant must establish sufficient reason for his failure to have raised the issue in prior postconviction proceedings. *See State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 517 N.W.2d 157 (1994). Because Starkweather had two prior postconviction motions and an appeal, the trial court may deny a subsequent postconviction motion without a hearing if it rephrases issues that were previously rejected and if it fails to establish sufficient reason for failing to raise the issue in the earlier proceedings.

¶6 Starkweather's argument that waiver of his right to testify was unknowing and involuntary and that his trial counsel was ineffective regarding that decision is procedurally barred. In his initial appeal, this court rejected a

similar argument, concluding that his waiver was voluntary and “the record conclusively demonstrates that he is not entitled to relief because it shows that his counsel’s recommendation was not deficient performance.” Although the present motion focuses on another facet of the same issue, it constitutes nothing more than artful rephrasing of the issue that has already been decided. For that reason, review of that issue is procedurally barred.

¶7 Although the trial court did not rely on Starkweather’s voluminous pro se postconviction motion, his failure to raise the issue in that motion would also bar consideration at this time unless Starkweather could establish sufficient reason for his failure to raise it in the pro se motion. He contends that he was not aware of the factual and legal basis for the claims. However, he was obviously present when he discussed potential defenses with Attorney Gray and, from his initial postconviction motion and appeal, was aware that a waiver of the right to testify had to be knowing and voluntary. He was also present throughout the trial at which the differences between the two phases were explained to the jury. The record does not support his present claim that he lacked factual or legal knowledge when he filed the pro se motion. Starkweather also attempts to justify his failure to raise the issue in his pro se motion because he suffers from a mental illness, described as “delusional disorder accompanied by paranoia.” He offers no support for his conclusory statement that this condition interfered with his ability to identify and raise this issue.

¶8 The record conclusively shows that Starkweather is not entitled to relief based on his trial counsel’s failure to present Jean Starkweather’s testimony

that an investigator told her Demery was shot at an earlier time.<sup>3</sup> Starkweather's theory of defense was that Demery was inadvertently shot by the police during the shootout and the police attempted to cover up their own mistake by framing Starkweather. Any evidence that Demery was killed hours before the police arrived would have negated that defense. Attorney Gray's failure to present evidence that would have contradicted the defense cannot be characterized as deficient performance. The defense Gray presented, although unsuccessful, stood a better chance of persuading the jury than Starkweather's bizarre story that he happened upon the scene of another murder during his shooting spree.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>3</sup> Jean Starkweather's proffered testimony was recited in Starkweather's pro se postconviction motion. This issue is also procedurally barred because it was raised in the pro se motion and, with the advice of counsel, the appeal from the order denying that motion was voluntarily dismissed.

